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No. 78-230

In the Supreme Court of the United States

OCTOBER TERM, 1978

CHARLES S. KALAV, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 30-34) is noted in a table at 577 F. 2d 752.

JURISDICTION

The judgment of the court of appeals was entered on June 9, 1978. A petition for rehearing was denied on July 14, 1978. The petition for a writ of certiorari was filed on August 9, 1978. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether petitioner was denied effective assistance of counsel.

STATEMENT

Following a jury trial in the United States District Court for the Central District of California, petitioner was convicted on one count of interstate transportation of money obtained by fraud, in violation of 18 U.S.C. 2314 (Count 2), and five counts of mail fraud, in violation of 18 U.S.C. 1341 (Counts 3, 4, 5, 6 and 7).[1] He was sentenced to three concurrent terms of 18 months' imprisonment on Counts 2, 3, and 4 and three concurrent terms of five years' probation on Counts 5, 6, and 7, to be served consecutively to the terms of imprisonment. The court of appeals affirmed (Pet. App. 30-34).[2]

The evidence at trial showed that in 1973, between April and September, petitioner offered four doctors an opportunity to buy stock in G.C.I. International (G.C.I.); petitioner represented to each one either that he had an option on the stock or would be able to make it available for purchase (Tr. 53-54, 88-92, 117, 157-159). Between April and September, the doctors mailed checks to petitioner in varying amounts, totaling $31,000, to

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[1]Counts 2, 3, 4, and 6 involved payments to petitioner. Counts 5 and 7 involved "lulling letters" sent by petitioner to two of the victims. A motion for judgment of acquittal was granted on Count 1, which involved a payment made to a person who testified that he had never spoken with or seen petitioner (R. 36, Tr. 46). "R." references are to the "Clerk's Record" prepared by the Clerk for the court of appeals. "Tr." references are to the transcript of the proceedings in the district court.

[2]While petitioner's direct appeal was pending in the court of appeals, he filed a motion in the district court, pursuant to 28 U.S.C. 2255, attacking his conviction on the ground of ineffective assistance of counsel (Pet. 7). The district court did not rule on the motion, but petitioner obtained leave from the court of appeals to raise the issue there by filing a supplemental brief in his pending direct appeal (Pet. 9).

purchase the stock (Tr. 54, 90, 114, 158-159). On September 5, 1973, and July 24, 1974, petitioner sent letters to two of the doctors promising to deliver G.C.I. stock as soon as the option was exercised (Plaintiff's Exhibits 11, 13, and 14; Tr. 115-117, 160-161, 166). None ever received any stock, however, nor was any money refunded to them (Tr. 55, 96, 117, 164). At trial, petitioner took the stand and admitted that at the time he received the money, he did not intend to use it to purchase stock, but instead planned to use it for his personal living expenses (Tr. 408). He presented no other witnesses.

ARGUMENT

Petitioner asserts that his counsel was constitutionally ineffective because he failed to call as a defense witness a former associate of petitioner's, William Montgomery, to testify regarding the dates between which petitioner actually had an option to purchase G.C.I. stock.

As petitioner points out (Pet. 19-20), there was a conflict in the trial testimony over the dates when petitioner's option became effective and when it was rescinded. The government's witness, Patrick DiCarlo, chairman and chief executive officer of G.C.I., testified that the option was granted in July 1973 and rescinded in August 1973 (Tr. 263, 291). Petitioner testified that the option was in existence from March 1973 until October 1973 (Tr. 384, 403-404). An affidavit of Montgomery, filed by petitioner to supplement the record on appeal, indicates that Montgomery would have testified that the option existed from sometime in March 1973 to sometime in November 1973. Petitioner contends that this testimony "would have negated one of the elements of the crime, namely, that petitioner knew that the representations he was making were false at the time he made them" (Pet. 27).

As the court of appeals correctly found, however, Montgomery's testimony would neither negate an element of the crime of mail fraud nor establish a defense to it (Pet. App. 34). The elements of 18 U.S.C. 1341 are simply (1) a scheme to defraud and (2) the use of the mails in executing that scheme. *Pereira* v. *United States*, 347 U.S. 1, 8 (1954); *United States* v. *White*, 355 F. 2d 909, 910 (7th Cir. 1966). Proof that a defendant did not own or possess the property in question, although relevant to the question of intent to execute a fraudulent scheme, is not essential to establishing the violation. *United States* v. *White, supra*.[3] The trial testimony established that petitioner solicited money from the four victims for the purchase of G.C.I. stock (Tr. 53-54, 88-92, 117, 157-159), and petitioner himself testified that he did not intend to buy stock with that money (Tr. 408). This satisfies the elements of the crime of mail fraud and demonstrates that it was irrelevant whether petitioner *could* have bought the

[3]Although the indictment alleged that defendant made fraudulent representations, including the representation "[t]hat defendant had an option which could enable him to obtain G.C.I. stock and then to transfer said stock to other people" (R. 2), it is not the case, as petitioner claims (Pet. 27-28), that the alleged representation regarding possession of an option was "the cornerstone" of the indictment. That representation was alleged merely as one of the means employed by petitioner in obtaining money from the victims to purchase stock and then retaining the money for himself. The government need not prove every such allegation of an indictment charging a scheme to defraud in order to establish a violation of 18 U.S.C. 1341. *United States* v. *Amrep Corporation*, 560 F. 2d 539, 546 (2d Cir. 1977); *United States* v. *Joyce*, 499 F. 2d 9, 22 (7th Cir. 1974) cert. denied, 419 U.S. 1031. In any event, the receipt by one of the victims of a lulling letter in an envelope postmarked July 24, 1974 (Plaintiff's Exhibits 13, 14; Tr. 160-161, 166) shows that petitioner was maintaining the pretense regarding the stock option even after the time during which, according to either his testimony or Montgomery's affadivit, he possessed such an option.

stock. Thus, the court of appeals properly concluded (Pet. App. 34) that the decision of petitioner's counsel not to call Montgomery as a witness was simply a question of trial tactics, which courts should not attempt to second guess. *Salazar* v. *Estelle*, 547 F. 2d 1226, 1227 (5th Cir. 1977). In short, the circumstances here do not provide a basis for questioning trial counsel's effectiveness.[4]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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[4]Although the courts of appeals have articulated different standards for assessing the effectiveness of counsel in criminal proceedings (see our opposition to the petition for a writ of certiorari in *Yelardy* v. *United States*, No. 77-6689; see also *Maryland* v. *Marzullo*, No. 77-784, cert. denied, May 1, 1978 (White J., dissenting)), this case presents no occasion for resolution of any conflict. Counsel's performance was more than adequate under any standard that might be applied.